Supreme Court, U.S.
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No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals held that an NSA employee may be removed for reasons relating to national security only by the Secretary of Defense, acting in person under either 5 U.S.C. 7532 or 50 U.S.C. 833(a), and that the Director of NSA thus has no authority to remove an employee "for cause" where the cause is related to national security. We argued in our Petition (at 10-19) that the court of appeals has wrongly decided a question of considerable importance and that its decision directly conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (argued Dec. 2, 1987). Respondent's arguments on the merits of the question presented (Br. in Opp. 3-6) were fully dealt with in our petition (at 10-17). Respondent, however, makes three additional arguments designed to show that this case is not certworthy.

1. Respondent contends (Br. in Opp. 2-3 & n.1) that NSA never invoked its "for cause" removal procedures in this case. That is incorrect. Respondent received a "notice of proposed action to remove you * * * in accordance with

the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service." NSA expressly relied upon that removal authority (and no other) and fully complied with its procedures governing "for cause" removals (see Pet. 7-9).[1]

The "cause" for respondent's removal was, of course, related to national security: clearance for access to sensitive compartmented information (SCI) is a continuing statutory requirement for employment at NSA (see Pet. 11-12), and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's assumption that NSA cannot have properly invoked its "for cause" removal procedures, because the cause for removal involved national security, merely repeats the error made by the court of appeals.

2. Contrary to respondent's assertion (Br. in Opp. 8-10), the impact of the decision below is by no means limited to NSA. Section 7532 has no special application to NSA; it also applies to other parts of the Department of Defense and a number of other departments and agencies (see Pet. 6 n.5). Employees subject to removal under Section 7532 include employees in the competitive service who may be removed "for such cause as will promote the efficiency of the service" under 5 U.S.C. 7512-7513. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause"

[1] When respondent's counsel requested a pre-removal hearing (C.A. App. 218-219) pursuant to 5 U.S.C. 7532, NSA replied that the removal was not pursuant to Section 7532, but rather "in accordance with NSAPMM Chapter 370" (C.A. App. 220). Thus, NSA again made clear its intent to rely upon its "for cause" regulations in removing respondent.

removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive service employees.[2]

3. The decision below directly conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, which explicitly held that a competitive service employee who is denied a security clearance required by his job may be removed for cause under 5 U.S.C. 7512-7513 without invocation of 5 U.S.C. 7532 (802 F.2d at 1567-1569). Respondent's assertion (Br. in Opp. 7) that the Federal Circuit merely "assum[ed]" without deciding that a "for cause" removal was appropriate is incorrect. Although none of the parties or amici in *Egan* took a contrary position, the issue was nonetheless decided by the court of appeals as an essential predicate to the court's decision of the issue actually in dispute. Indeed, the court of appeals devoted an entire section of its opinion to the question.[3]

For the foregoing reasons, and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted either now or after the Court's decision in *Department of the Navy* v. *Egan*, No. 86-1552.

CHARLES FRIED
Solicitor General

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[2] The court of appeals did stress (Pet. App. 9a) that Section 7532 predates the National Security Agency Act of 1959, but, whatever the relevance of that point (see Pet. 18 n.12), Section 7532 also predates the Civil Service Reform Act of 1978.

[3] The question was also decided by the MSPB in a separate section of its opinion. 28 M.S.P.B. 509, 520-521 (1985). In fact, the MSPB specifically solicited amicus briefs from interested parties on that issue. See 50 Fed. Reg. 2355 (1985); 49 Fed. Reg. 48623 (1984).

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